

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SCOTT DAVID DUNKERLEY,

PETITIONER-APPELLANT

V.

CORNELIUS HOGAN, In his official capacity
as Commissioner of Corrections for the
State of Vermont, and
RICHARD BASHAW, In his official capacity
as Superintendent of the St. Albans
Correctional Center

RESPONDENTS-APPELLEES

DOCKET NO. 77-2138

I. STATEMENT OF THE ISSUE

Does a sua sponte declaration of a mistrial, over defense objection and despite suggested alternatives, when petitioner suffered a temporary illness and was hospitalized for a 7-10 day period, (there appearing no factual findings in the record to support the decision in the interests of public justice) constitute a bar, on double jeopardy grounds, to a subsequent trial?

II. STATEMENT OF THE CASE

This is an appeal of the United States District Court for the District of Vermont's denial of habeas corpus relief in an Opinion and Order rendered by Hon. Albert W. Coffrin, District Judge, on October 13, 1977. App. at 41. Petitioner-appellant (hereinafter Dunkerley) moved for a stay of State criminal proceedings pending this appeal which was granted in open court on October 25, 1977. See Memorandum Opinion dated November 14, 1977, App. at 56.

Habeas corpus relief was sought in federal court following requests for similar relief in the appropriate courts of the State of Vermont to no avail.^{1/}

^{1/}On October 15, 1976, following two full days of proceedings in the first degree murder trial of Dunkerley, the court declared sua sponte a mistrial. That court denied Dunkerley's motion to dismiss on double jeopardy grounds and denied, as did the Vermont Supreme Court, his motion to file an interlocutory appeal. A petition for habeas corpus relief filed in Chittenden Superior Court was denied and affirmed by the Vermont Supreme Court in an opinion dated June 7, 1977. In re Dunkerley, Vt. _____ (1977). App. at 25.

III. STATEMENT OF THE FACTS

The following factual statement is, in part, quoted from the lower court's Opinion supplemented by factual information not appearing therein.

On October 13, 1976, petitioner was brought to trial for the first degree murder of his stepfather. After two days of trial, petitioner was hospitalized because of a partially [fifteen percent] collapsed lung. There is no indication that the disability was in any way induced by petitioner. Upon learning of the hospitalization, the trial court had three conferences with prosecution and defense counsel at which he solicited their recommendations as how to proceed.

Defense counsel requested either a continuance for the seven to ten days petitioner's doctors anticipated he would be incapacitated, or a voluntary waiver by petitioner of further appearance under Vermont Rule of Criminal Procedure 43(b)(1). Counsel told the court that he wanted to avoid a second trial because a mistrial would greatly prejudice petitioner's rights, testifying caused petitioner's mother "enormous psychological hardship," and having to go through two trials would cause petitioner hardship. Here petitioner alleges in addition that he desired to continue the trial because he wanted a speedy trial and because "in the opinion of the defense the trial was going particularly well for the defendant."

At the time when declaration of a mistrial was being considered, petitioner's mother had already testified regarding the events of the night of the shooting and her relationship with her son, his childhood, his dependence upon her and the animosity between him and his stepfather. The state had indicated that it intended to call two psychiatrists, several police officers, some laboratory personnel and the chief medical examiner. The defense had indicated that it intended to call petitioner and two other psychiatrists.

In response to the alternatives suggested by counsel for the defense, the prosecution told the court the state would not proceed without petitioner's presence, and suggested that the court might declare a mistrial sua sponte. The prosecution refused to move for mistrial

itself without researching whether double jeopardy would bar retrial. Approximately two hours after learning of the hospitalization, the trial judge declared a mistrial because he felt the case would not be very lengthy when ultimately tried, and that a mistrial was necessary "in order to insure a fair trial for the defendant" and "in the interest of justice." He advised the jury that he did not see any other alternative in fairness to both the respondent and the state.

Opinion and Order, App. at 41-43; Transcript of October 15, 1976, conferences, App. at 14, 18, 21, 20; Petitioner's Memorandum of Law at 10 and 8.

The trial date of October 13, 1976, was set in response to Dunkerley's Motion for Speedy Trial dated August 27, 1976, wherein Dunkerley noted that he was incarcerated for lack of meeting bail conditions; an expected trial date of September 20 had been indefinitely postponed (due to, although not reflected in the record, the death of the presiding judge); he was suffering severe emotional disturbance while awaiting trial, including an attempted suicide; he was implicated in an alleged escape attempt which prompted his transfer to another correctional facility; and the risk of further mental and emotional deterioration should pretrial detention continue indefinitely. In that motion, Dunkerley acquiesced to a waiver of venue to a different judicial district than the one where the offense occurred, "if such waiver will in any way materially advance the date of his trial." This waiver of venue was personally executed by Dunkerley at the place of his then confinement, the Vermont State Hospital at Waterbury, Vermont, and the trial date of October 13, 1976, was set. Venue was changed from Caledonia County to Orleans County. App. at 4-6.

On October 2, 1976, before the jury had been chosen, Dunkerley requested that the jurors not be sequestered for the following reasons: The defense was insanity, or, in the alternative, diminished capacity, and the facts of the killing were not to be disputed. Therefore, publicity was not a worry to the defense. Additionally, the jurors were rural residents and the defense did not wish them to undergo the

rigors of motel "lock-up." Partial transcript of proceedings, App. at 7-10. The trial court denied Dunkerley's non-sequestration request and sequestered the jury sua sponte. Id. at 8.

On the morning of October 14, the trial began. The undisputed facts concerning the crime were that on April 6, 1976, at approximately 7:45 p.m., defendant shot and killed his stepfather with a .22 caliber pistol shortly after his stepfather had called the police to have defendant removed from the premises. The homicide occurred in a trailer located in a remote section of Walden, Vermont. Trial Transcript, at 8, 9, 14-16, 19, 22, 24-25. The only defense to the killing was that at the time of the killing defendant was legally insane, and therefore not guilty, or so diminished in capacity as to be not guilty of first degree murder. The defense position was that due to a pathological dependence on his mother, Sandra Downer, and other causes, defendant lost touch with reality at the time of the shooting, believing his mother wanted her husband dead and was unable to control himself. Mrs. Downer testified about the circumstances of the shooting and the events leading to it. She described three isolated people being closely confined in a trailer with little money, no employment, and nothing constructive to do. She described her husband's dislike for the defendant and the constant wrangling and arguing among the three of them, sometimes including physical mistreatment of herself by her husband. Mrs. Downer further described defendant's childhood, the incidents of child abuse and defendant's problems with hearing, speaking and eating. Trial Transcript, at 29-79, 87-133.

After Mrs. Downer had testified on both direct and cross-examination and another State witness had testified, the court was recessed until the following morning, October 15.

On the morning of October 15, 1976, a series of conferences was held between the court and counsel in chambers and in open court. App. at 11. Prior to the

morning's proceedings defendant had suffered a partially (15 percent) collapsed lung and was hospitalized. Discussions between the presiding judge, counsel for the State and counsel for defendant centered around the nature of defendant's illness, the need for hospitalization and the impact of this event on the trial.

Counsel for defendant requested that the trial continue and suggested alternative procedures for continuing it, including securing a waiver of appearance directly from defendant, in accordance with Rule 43(b)(1) V.R.Cr. P.^{2/} The prosecution took the following position:

...the state will not proceed with the presentation of evidence without the defendant present in the courtroom at all times. Under no circumstances.

App. at 14. No practical reason for such an assertion was offered and none appears in the record. The presence of defendant did not have any bearing on the presentation of the State's case since identification was not in issue. Counsel for defendant persisted in attempts to convince the court to avoid declaring a mistrial by offering to waive sequestration, submit to a short continuance and interview the defendant as to his wishes. App. at 13-14, 15, 17-18, 19, 21.

In open court the prosecution reiterated its intention not to proceed in defendant's absence, taking the position that the absence was not voluntary, saying:

^{2/}The Vermont Criminal Rule provides in pertinent part:

RULE 43. PRESENCE OF THE DEFENDANT

.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented whenever a defendant, initially present,

(1) in noncapital cases, voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial, . . .

Under no circumstances, considering the seriousness of this charge will the State consent to the proceedings to go on without the presence of the defendant. I suppose now the only alternative is a mistrial.^{3/}

App. at 17. The State, however, expressly declined to move for a mistrial on several occasions when questioned by the court and further suggested, "Jeopardy is not effected [sic] by the court on its own motion declaring a mistrial." App. at 19.

The trial court then declared a mistrial noting the case would not be a "very lengthy" one when "ultimately tried," and that it would be unfair to the State and defendant to do otherwise. App. at 20, 22. The defense's final response was:

[O]ur position is that he [Dunkerley] has been placed in jeopardy here and that any subsequent trial would be double jeopardy.

App. at 21.

^{3/} The prosecutor at a hearing on Dunkerley's Petition for a Writ of Habeas Corpus before the United States District Court expressed what he had meant when he told the trial court of the State's adamant unwillingness to continue the trial in Dunkerley's absence. After a colloquy between a prosecutor not present at the Dunkerley trial and Hon. Albert W. Coffrin, D.J., concerning the strong stand of the Dunkerley prosecution in not going forward in Dunkerley's absence, the following colloquy occurred:

MR. KEEFE: Your Honor, may I add one thing?

THE COURT: Yes.

MR. KEEFE: Your Honor, Mr. Everett made an inference about the fact that under no circumstances would the State continue without the Defendant present. That statement was made by me, and although I do not recall specifically what I had on my mind at the time, we were obviously objecting to the trial continuing in the absence of the Defendant. That aside, had the Judge ordered a continuance of the trial without the Defendant, the State would have gone along with that in presenting its case. We do not want the Court to get the idea we would not continue our case.

THE COURT: The Court does not get that, but it seems to me the prosecution was pretty strong in its statement.

MR. KEEFE: It does appear strong on its face, I agree.

THE COURT: Mr. Morse?

MR. MORSE: May it please the Court: Mr. Keefe said at this date if he had the knowledge of the Monday morning quarter back and things [had] been different, he would, of course, have gone along with the Judge's wish for the trial to proceed. However, the appearances at that time did not seem to impart that understanding he is impressing today. ...

App. at 37.

IV. ARGUMENT

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARS
RE-TRIAL OF DUNKERLEY BECAUSE THE MISTRIAL DECLARED OVER
HIS OBJECTION WAS NOT MANIFESTLY NECESSARY NOR WERE THE
ENDS OF PUBLIC JUSTICE FURTHERED THEREBY.

One of the best statements of the purposes of the Double Jeopardy Clause of the Fifth Amendment ("[no] person [shall] be subject for the same offense to be twice put in jeopardy of life or limb") was declared by Mr. Justice Black in Green v. United States, 355 U.S. 184, 187-88 (1957):

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Beginning with Gori v. United States, 367 U.S. 364 (1961) (5 to 4), the United States Supreme Court cases dealing with sua sponte mistrial declarations have been fraught with disagreement. Illinois v. Somerville, 410 U.S. 458 (1973) (5 to 4); United States v. Jorn, 400 U.S. 470 (1971) (6 to 3); Downum v. United States, 372 U.S. 734 (1963) (5 to 4). Under the view of any of the plurality or minority opinions of the Supreme Court, however, reversal of the instant case is both logical and well founded in policy.

In Gori, the Court ruled that a mistrial declared "without petitioner's 'active and express consent'" was not a bar to retrial because it "clearly appear[ed] that [the] mistrial [was] granted in the sole interest of the defendant." Gori, supra, at 365, 369. The presiding judge sua sponte, "and with neither approval nor objection by petitioner's counsel," declared the mistrial, after withdrawing a juror, apparently because "the prosecuting attorney's line of questioning presaged inquiry calculated to inform the jury of other crimes by the accused." Id. at 365, 366. The Gori majority noted:

Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment--cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused.

Id. at 369. Mr. Justice Douglas, expressing the opinion of four members of the Court, dissented on the ground that the record did not demonstrate a "showing of impervious necessity" for the mistrial. Id. at 371.

Insofar as Gori stands for a "sole interest of the defendant" standard, later cases have cast doubt on the holding. Illinois v. Somerville, supra, at 464; United States v. Jorn, supra, at 482-83, 486.

In an equally close case, which went the other way, Downum v. United States, supra, after selection of a jury but before evidence was presented, a mistrial was declared over defendant's objection, because a prosecution key witness on two of eight counts was not present, nor had he been subpoenaed to appear. The Court ruled that the Fifth Amendment barred retrial saying, at 738:

We resolve any doubt "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion."

Mr. Justice Clark, writing for four members of the Court, dissented on the basis that the prosecutor was guilty of nothing more than "harmless oversight," id. at 743, and sa. 1:

The first jury had never begun to act in this case. Petitioner was never formally arraigned in the presence of the first jury, nor was any evidence presented or heard for or against him at that time nor was he required to put on any defense. In addition, the second jury having been impaneled two days later, there was no continued or prolonged anxiety, nor was the petitioner caused any additional expense or embarrassment, deprived of any right or prejudiced in any way. Neither has petitioner contended that one jury was more or less favorable than the other.

Id. at 741-42.

The Downum dissent also commented that to continue the case and hold the first jury together "would have laid up 12 men on the panel for an indefinite period and disrupted the calendar for the entire week, if not longer." Id. at 742. It should be noted that defense counsel for Downum did not suggest alternatives other than proceed without the absent prosecution witness on the unaffected counts and dismiss the affected counts.

In United States v. Jorn, supra, six members of the Court upheld defendant's double jeopardy claim. A trial was aborted by the trial judge because prosecution witnesses had not been given proper warnings concerning their Fifth Amendment testimonial privilege. Noting, "society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant," id. at 479, and the defendant's "valued right to have his trial completed by a particular tribunal," id. at 484; Wade v. Hunter, 336 U.S. 684, 689 (1949), the Court found that the trial judge abused his discretion in discharging the jury. The key to the decision was the failure of the trial court to take into consideration alternatives to a mistrial. Jorn, supra, at 487.

The Jorn dissent, noting that the defense counsel's "line of questioning that resulted in the mistrial may have been initiated...with just such a result in mind," declared that the mistrial "could not possibly have injured the defendant." Id. at 493.

In its latest pronouncement on the subject, Illinois v. Somerville, supra, a divided court held that the Double Jeopardy Clause does not prevent a retrial when the aborted proceeding involved a fatal defect which would inevitably lead to a reversal of a conviction. The Somerville Court stressed a "balancing" test:

The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one. ...Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration. ... But where the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice.

Id. at 471.

In a dissenting opinion, Mr. Justice White (who dissented in Jorn, supra), joined by two members of the Court, stressed that Somerville may have been acquitted and that the majority eschewed his right to "'confrontation with society through the verdict of a tribunal he might believe to be favorable disposed to his fate'." Id. at 473, 474; United States v. Jorn, supra, at 486. Mr. Justice Marshall, in a separate dissenting opinion, took issue with the majority's "balancing" test and concluded:

the balance that the majority strikes essentially ignores the importance of...the accused's interest in his "valued right to have his trial completed by a particular tribunal."

Somerville, supra, at 478; Wade v. Hunter, supra, at 689.

Whether one views the essential thrust of the double jeopardy clause as protecting a defendant from (a) governmental harassment by allowing the prosecution an opportunity to improve its case the second time around, (b) stress and anxiety brought about by undergoing successive trials or (c) losing a chance to obtain a favorable verdict from a tribunal first chosen, the circumstances in the case at bar involve all three policy considerations.

This Court has on a number of occasions articulated its views as to the meaning of Justice Story's oft-quoted standard that a mistrial declared, without the consent of the defendant, shall bar retrial, unless:

...there is a manifest necessity for the act,
or the ends of public justice would otherwise
be defeated.

United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). E.g., United States v. Grasso, 552 F. 2d 46 (2d Cir.), petition for cert. filed, 46 U.S. L.W. 3089 (U.S. May 6, 1977) (No. 76-1543); United States v. Gentile, 525 F. 2d 252 (2d Cir. 1975), cert. denied, 425 U.S. 903 (1976); United States v. Glover, 506 F. 2d 291 (2d Cir. 1974). To be sure, "it is impossible to define all the circumstances which would render it proper," Perez, supra, nor is a "rigid formula" to be applied to the subject. Wade v. Hunter, supra, at 690. Nevertheless, given the fundamental nature of double jeopardy protection,

...the power [to declare a mistrial sua sponte without doing violence to the Fifth Amendment] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes....

United States v. Perez, supra. See United States v. Coolidge, 25 F. Cas. 622, 623 (C.C.D. Mass. 1815) (Justice Story) (discretion to declare mistrial should be exercised "only in very extraordinary and striking circumstances").

The most recent pronouncement by this Court on the issue is stated in United States v. Grasso, 552 F. 2d 46, 51-52 (2d Cir. 1977) (Emphasis added).

...[W]e are...required, in resolving the question of "manifest necessity" to determine whether the trial judge considered all the procedural alternatives to a mistrial, so as "not to foreclose the defendant's option to have his cause tried by the original jury until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."...[T]he trial judge [is] at least to consider viable alternative measures before sua sponte declaring a mistrial....

Since evaluation of discretion is involved, a necessary procedural corollary ...is that, before a trial judge declares a mistrial, he must make explicit findings, preferably after a hearing, that there are no reasonable alternatives to a mistrial.... If reasonable alternatives to a mistrial are available, the trial should continue.

The dissent in Grasso (Timbers, C.J.) argued that before the protection of the Fifth Amendment may be invoked, the defendant should clearly object to the declaration and offer alternatives to a mistrial, thereby affirmatively invoking the "client's 'valued right to have his trial completed by a particular tribunal,'...at the time the mistrial is declared,...." Grasso, supra, at 55 (Emphasis in original). This is exactly what counsel for Dunkerley did and, absent "explicit findings," a mistrial was declared without mention of the viability of the alternatives suggested by the defense. Thus, Grasso is strong support for granting the relief requested, and, given the Grasso dissenting position on the issue and the facts in the instant case, Grasso presages relief a fortiori.

In Grasso, like the case at bar, reasonable alternatives to continue the trial were available, but consideration of these alternatives "was at best oblique." Id. at 53. The trial court's stated reasons for the mistrial in Grasso, id. n.3, were no less "oblique" than those stated in the Dunkerley trial. The Dunkerley court merely concluded that it was fair to grant a mistrial to both the defendant and the state without stating one reason why it was fair. Clearly, the record of the mistrial declaration does not comport with the caveat expressed in Grasso that "the court is free

explicitly to reject [suggested alternatives] as inadequate to cure the situation." Id. at 54 (Emphasis added). The Dunkerley court remained silent as to why any of the suggested alternatives were inadequate and no reason appears in the record to suggest that counsel's recommendations were untenable under the circumstances.

In addition, had the trial court in State v. Dunkerley agreed with one of defense counsel's suggested alternatives, "[t]here...[could] be no claim...that, if continued, the proceeding would have produced a verdict that could have been upset at will by one of the parties." Id. at 54; Illinois v. Somerville, supra, at 464.

Whenever a court is called upon to exercise discretion on a matter, it necessarily must weight competing circumstances and reach a balancing of the interests at stake. The Perez doctrine, and the litany of cases following it, recognize that heavy weight must be accorded the defendant's claim of double jeopardy protection--especially, it is submitted, when the defendant explicitly claims the protection at the time the mistrial is about to be declared. In order to outweigh the assertion of this Fifth Amendment protection there must be compelling competing interests of greater significance before the right to be tried once can be thwarted in the interests of justice. To conclude that public interests of justice existed in the Dunkerley trial, one would have to speculate as to what they were and speculate further to conclude that they were of such compelling nature to override the interests of Dunkerley. Dunkerley not only asserted his desire not to "'run the gauntlet' a second time," Abney v. United States, _____ U.S. _____, 52 L. Ed. 2d 651, 661 (1977), and his desire to place his fate before the tribunal first chosen, Wade v. Hunter, supra, at 689, but also adamantly expressed his desire for a speedy trial as discussed at p. 4, supra.

There can be no doubt that both suggested alternatives to a mistrial were possible under Vermont law. In In re Dunkerley, supra, App. at 25, the court ruled that the trial judge did have discretion to allow the defendant to be absent

in "extraordinary circumstances," citing United States v. Tortora, 464 F. 2d 1202, 1210 (2d Cir.), cert. denied, 409 U.S. 1063 (1972). Was not the temporary physical ailment of Dunkerley just such an "extraordinary circumstance," given his Fifth Amendment right and the absence of prejudice to the State?

The second alternative pressed by the defense, a continuance of seven to ten days and nonsequestration of the jury, was equally feasible, since no prejudice would appear to the State by so proceeding and Vermont law supported such an action by the court. In State v. Anderson, 119 Vt. 355, 361 (1956) (Emphasis added), the Vermont Supreme Court stated:

Some jurisdictions go so far as to say that a respondent may not even waive his right to have the jury kept together. ...We think, however, that the better rule, and the one which is consistent with our practice is to the contrary. We hold that a complete dispersion of the jury in a case of felony, in which the jurors are permitted by the court to pass from under the eye of the officer having them in charge, the respondent not having consented thereto, is improper.

See also State v. Brisson, 124 Vt. 211, 213 (1964). In Vermont, then, in non-capital felony cases, a defendant has the choice of whether or not the jury is to be sequestered or at least to request legitimately in accordance with his preference. In the case at bar, no claim can be made that such a choice was not made voluntarily since defendant wished the jury to be unsequestered from the very beginning of the trial. App. at 8-9.

It is difficult to understand why the Court did not permit a continuance. Perhaps it might be argued that the jury could become "infected" by prejudice against the State or accused during the week or so interlude. Mistrials are not declared on the basis of vague hypotheticals or speculation, however. Speculative grounds for a mistrial were rejected expressly by the United States Supreme Court in United States v. Jorn, supra, at 483. Again, it might be argued that the defendant could have

developed medical complications and been hospitalized a good deal longer than seven to ten days. In retrospect, this did not occur and, had it done so, the mistrial issue could have been reviewed when the complications arose.

In sum, a short continuance in this case would have alleviated the scheduling problem posed by the interruption due to petitioner's medical health.

The Opinion Below:

The lower court did not find merit in the claim that habeas corpus relief necessarily followed from a line of cases dealing with the "sole interest of the defendant" doctrine. E.g., United States v. Jorn, 400 U.S. 470 (1971); Gori v. United States, 367 U.S. 364 (1961); United States v. Glover, 506 F. 2d 291 (2d Cir. 1974). It suffices to say there is reason to believe that the "sole interest" test is an inappropriate guide to resolution of double jeopardy claims in the context of a mistrial. See discussion at p. 9, supra. Nevertheless, it is abundantly obvious that Dunkerley's interests were not served by the declaration of a mistrial.^{4/}

^{4/}In the case at bar, there were many reasons why Scott Dunkerley did not desire a mistrial and why the mistrial was not to his benefit.

First, in the opinion of the defense the trial was going particularly well for the defendant. Petitioner's mother, a crucial witness regarding the insanity defense, had testified under extreme emotional distress. Naturally, given petitioner's dependence on his mother, her testimony was extremely trying to him. The ordeal of watching and listening to his mother's testimony is dramatically evidenced by the onset of his affliction on the following day. Moreover, the declaration of a mistrial allowed the prosecutor to reassess Mrs. Downer's testimony which, in fact, perhaps represented the most favorable defense testimony that was to be elicited at the trial. In Illinois v. Somerville, supra, at 469, the Court noted that a mistrial may entail not only a delay for the defendant, "but also [may operate] as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." Similarly, here the prosecution would have an opportunity to approach Mrs. Downer's testimony differently in the event of a second trial in an attempt to discredit defendant's insanity defense.

In addition, it was not in the defendant's interest to sacrifice the trial date he had sought so conscientiously and forthrightly and return to prison to wait months for another day in court.

The lower court commented that Dunkerley's claim for relief was "most forcefully supported" by United States v. Grasso, supra, and with this Dunkerley agrees. App. at 47 . Yet, the District Court distinguished Grasso in several respects and found its reasoning unpersuasive. It is submitted that the distinguishing features of Grasso discussed by the lower court are not of controlling significance.

The district court opinion attempted to distinguish Grasso by saying that that case involved recantation of testimony by a witness, while Dunkerley involved an involuntary illness. Apart from demurring from this stated difference without any perceived distinction, that it was the defendant who, through no fault of his own, presented a situation requiring a consideration of alternatives to a mistrial, gave Dunkerley a greater number of viable alternatives to present to the court than, say had an important prosecution witness become similarly ill; he, in addition to asking for a short continuance, was opting to absent himself to accommodate continuation of the trial. In this respect, the district court distinguishes Grasso by saying:

There, mistrial was provided by the prosecution's witness recanting his testimony rather than by the involuntary physical incapacity of the defendant; the prosecution could have continued on counts unaffected by the recantation or on all counts with a proper instruction to the jury.

App. at 47. Admittedly, the alternatives in Grasso were unique to that case, as were those to the Dunkerley case; on the other hand, the varying alternatives were not a distinguishing factor between the two cases. Realistically, given the different defense postures between the two cases, the alternatives offered in Dunkerley were clearly defined and reasonable on their face, while those in Grasso were debatable and murky since defense counsel in Grasso took no position with regard to them and a detached observer reasonably would find them attenuated, at best. The district court attributed the "cause" of the mistrial in Grasso to the prosecution rather than the defense. More concisely stated, however, is in neither case can the "cause" of the mistrial be attributed to any conscience or purposeful conduct by either side.

"[M]ost importantly," according to the district court, and its final distinction,

there was scant evidence that the trial court in Grasso explored alternatives to mistrial other than the defendant's motion to dismiss or for acquittal.

In the instant case, the judge was aware of alternatives to mistrial because they had been advanced by counsel and of the preference of the defendant's attorney for obtaining a verdict with the impanelled jury.

App. at 47-48. Implicit in the district court's denial of relief, therefore, is its view that the court declaring the mistrial in Dunkerley considered and weighted the alternatives and rationally concluded that there was no viable alternative to a sua sponte declared mistrial. Squarely this is where the irony between Grasso and Dunkerley becomes apparent.

Had the Dunkerley defense held back offering meaningful alternatives and merely not assented to the mistrial, the Grasso majority opinion would have been ample support to require granting of the petition for habeas corpus. Instead, counsel for Dunkerley followed the course suggested by the Grasso dissent by objecting to the mistrial in no uncertain terms, and by offering explicit alternatives thereto. Yet, despite not one word in the record to indicate why these alternatives were not acceptable to the court, the district court has concluded that "a scrupulous exercise of judicial discretion," Jorn, supra at 485, occurred. This simply does not square with Grasso.

The Opinion of the Vermont Supreme Court

Although not discussed nor commented upon by the United States District Court in its opinion, the Vermont Supreme Court arguably rested its denial of relief on the proposition that it would be questionable to allow a defendant to absent himself from trial in a case involving the defense of insanity. In re Dunkerley, supra, App. at 25.

The Vermont Supreme Court apparently has held that the defendant in a criminal trial, wherein the defense of insanity is in issue, may be required to attend all stages of the proceedings so that the jury may observe and evaluate him, "with respect to his mental condition," citing In re Pray, 133 Vt. 253, 257 (1975). Having stated this proposition, the Court follows with the conclusion that the trial judge did not abuse his discretion by declaring the mistrial. While it may or may not be an "abuse of discretion" not to allow a continuance or permit a defendant to absent himself under "ordinary" circumstances, in cases involving "manifest necessity," "[i]t would be stultifying to treat [them]...as involving 'abuse of discretion.'" United States v. Glover, supra, at 299 n.15. Several points demonstrate the fallacies in this logic in the case at bar.

First, the issue in a case where the defense is insanity is not the mental condition of the accused at the time of trial but his state of mind at the time of the alleged crime. In such a case, it would be grossly unfair to allow a jury to consider the demeanor of a defendant while he is sitting at counsel table to determine whether or not he was legally insane at the time of the offense. This point is aptly put in Trial in Absentia Re-examined, 40 Tenn. L. Rev. 155, 185 (1973):

Just as the defendant's obstreperous conduct can be pernicious, in some circumstances his good conduct can also be harmful. The determination of sanity at a trial or hearing provides an excellent example. Generally, the defendant has already been found competent to stand trial. The issue at this proceeding is the defendant's sanity at the time of the crime, which may have occurred months or years before the trial. The judge or jury, unfamiliar with the sophisticated concepts of psychiatry and mental illness, must determine the defendant's state of mind at that distant time. Expert testimony is used to establish the defendant's competence when the crime was committed. Often one group of experts will characterize the defendant as having acted under various delusions. Other experts may report finding no significant abnormality. The trier of fact must then decide the fate of the defendant who calmly and attentively

faces them at counsel's table. Certainly his appearance at trial will be considered in determining his competence during the crime. His apparently normal demeanor may convince the trier of fact that he was sane at the time of the crime, even though a normal appearance is characteristic of the alleged illness or his appearance has changed in the interim between crime and hearing. Had the accused been permitted to be absent during this hearing, the trier of fact may be able to give more attention to the expert testimony and less to the often misleading and irrelevant factor of the defendant's present appearance.

The influence of a courtroom setting upon the defendant (any defendant) during the ritual of a criminal trial may well cause him to act unusually subdued or in a manner generally out of character with his everyday demeanor. A defendant having pled not guilty by reason of insanity, who acts "crazy" during the trial--the type of demeanor one would suppose would impress his jurors to favor his defense--is not likely to be tried very long because of his apparent lack of competency to stand trial.^{5/}

Second, the reasoning of the Vermont Supreme Court simply does not apply to the Dunkerley trial. Petitioner was present at counsel table during the day his jury was selected and the following day during which his mother testified about the homicide and his trying childhood and teenage years. There was ample opportunity to observe his "demeanor," if such were important. Scott Dunkerley's insanity defense, however, was his uncontrollable behavior at the time he shot his stepfather--some seven months before his trial.

Last, and most important, the issue of defendant's continued presence at trial for the reasons outlined by the Vermont Supreme Court was neither raised nor considered by the trial judge in reaching his decision to declare a mistrial. Had the trial

^{5/}One would suppose, if the Vermont Supreme Court is correct with regard to evaluating defendant's mental condition existing many months before his presence before the jury, the prosecution would be entitled to an instruction telling the jury that their decision concerning "the justifiability of his defense of insanity," In Re Pray, supra, at 257, could be based, in part, on defendant's behavior while sitting at counsel table!

judge considered the issue of jury observation of Scott Dunkerley, could that standing alone, constitute the "manifest necessity" to declare a mistrial when this factor is weighed against defendant's "valued right to have his trial completed by [the] particular tribunal" first chosen, Wade v. Hunter, supra, at 689; United States v. Jorn, supra, at 484, his right to a speedy trial, and his willingness to submit to a continuance of the trial for a 7-10 day period?

It should be noted that the only justification for upholding the propriety of the mistrial in the face of double jeopardy by the Vermont Supreme Court was the factor of jury observation of defendant's mental state while he sat or stood in the courtroom. The cases relied upon by the Vermont high court are inapposite.

Featherston v. Mitchell, 418 F. 2d 582, 586 (5th Cir.), cert. denied, 397 U.S. 937 (1969), involved a situation in which a mistrial was declared because a serious question was raised (by the defense) that the defendant was not competent to stand trial. Nothing appears in the Featherston opinion to suggest that defendant objected to the mistrial or offered meaningful alternatives to a mistrial. Further, when competency to stand trial is in issue, so too is the defendant's ability to waive certain rights or accede to measures that would obviate the necessity for a mistrial in issue. Featherston, therefore, has little or no bearing upon the instant case.

The only other case relied upon by the Vermont Supreme Court is United States v. Tortora, 464 F. 2d 1202 (2d Cir.), cert. denied, 409 U.S. 1063 (1972). Tortora, however, is so far afield that the logic of that opinion had to be twisted 180° around to make it seem material to In Re Dunkerley. In truth, Tortora supports petitioner's claim rather than detracting from it. A defendant in Tortora was tried in absentia because he knowingly and intentionally did not appear for his trial without just cause. The Second Circuit concluded that such conduct amounted to "an intention to obstruct the orderly processes of justice." Id. at 1208. No mistrial was declared; instead the court decided to start and continue the trial in defendant's absence.

The Vermont Supreme Court held that "the [Dunkerley] trial [did not have] to go on," App. at 31, based on dictum in Tortora, supra at 1210, saying that proceeding with a trial without the defendant present should be permitted only in circumstances as extraordinary as existed in Tortora. After saying this, the Vermont Supreme Court leaped to the conclusion that the double jeopardy clause did not prevent a retrial of Scott Dunkerley. There is a lot of ground to cover between the place the Vermont Supreme Court started and the place it concluded. First, is not the circumstance that the defendant had a valued and important right to continue with the jury he chose an extraordinary one compelling a decision to honor defendant's wish to be absent for the remainder of the trial? Second, would not the declaration of a 7-10 day continuance of the trial be a perfect way to assure the defendant's presence and simultaneously to obviate any need for the declaration of a mistrial? Petitioner respectfully suggests that the Vermont Supreme Court's analysis relying on Tortora begs important questions, the answers to which ineluctably lead to the conclusion that the mistrial decision was based on neither logic nor deference to important rights and interests of the defendant and the state.

The point can be seen, if the situation posed in State v. Dunkerley were reversed. Suppose a key witness for the prosecution, before testifying, became ill (15% collapsed lung with a 7-10 day recovery period) after trial had commenced. A mistrial in such a situation declared over the objection of the defense clearly would involve the protection of the Double Jeopardy Clause, if the defendant had agreed to a continuance of the trial for 7-10 days or had he agreed to a deposition to be introduced in lieu of in-court testimony of the witness. Returning to the case at bar, what justification existed to declare a mistrial given the defendant's demonstrated willingness to accommodate any significant disruption in the trial schedule?

In short, the reasoning of Tortora was turned upside down by the Vermont Supreme Court and applied to a situation where it does not apply. In a criminal case, a mistrial declared sua sponte is permitted only in "extraordinary circumstances"; otherwise, declaration of such a mistrial forecloses a subsequent trial for the same offense. The Vermont Supreme Court held, in effect, that the judge acted properly in declaring a mistrial, because to allow the trial to go on without defendant present could be allowed only in "extraordinary circumstances." When analyzing this reasoning, one wonders what happened to the requirement of "manifest necessity" in declaring a mistrial over defendant's objection. Second, why are not a defendant's right to be tried once before the tribunal first chosen, the right to a speedy trial and a willingness to agree to a short continuance "extraordinary circumstances," at least as extraordinary, if not more so, than those existing in Tortora?

A few comments in the final paragraph of the Vermont Supreme Court opinion list two additional factors which that court felt bolstered the reasonableness of the mistrial declaration. First, the Court mentioned the possibility of a "prolonged absence by the defendant." App. at 31. Anything is possible, but in light of the prognosis of 7-10 days' hospitalization absent any complications which might hypothetically occur, it is clearly improper to give this factor any weight. As stated in United States v. Jorn, supra, at 483, "an appellate court's post hoc assessment ...of benefit...involves nothing more than an exercise in pure speculation." Here, however, Scott Dunkerley was returned to the correctional center from which he came at almost precisely the date his doctors said he could leave the hospital, October 25, 1976. Stipulation of Facts, dated June 24 and June 29, 1977, paragraph 6, App. at 33. In short, the actual absence of defendant was as brief as anticipated and complications did not occur which could have led to a "prolonged absence."

Second, the Vermont Supreme Court stated:

Moreover, with the growing body of law that permits a defendant to disaffirm actions such as waiver by attorneys on his behalf, soundly or unsoundly, a realistic evaluation of the comparative interests of the public and the defendant in a trial without the issue of his right to be present is appropriate.

App. at 31. It is somewhat unclear what the Court intended to communicate by this statement, but petitioner's attorneys did not rely solely on a waiver of rights through counsel; counsel several times requested the court to secure the necessary waiver by interviewing the defendant in person on the record, with counsel for both sides, the judge and court reporter present. App. 14, 18. These requests did not even elicit a response from the court, let alone prompt the Court to take measures to carry out the requests. What was meant by "a realistic evaluation...without the issue of his right to be present is appropriate," is hard to fathom, but one would suppose in our adversary system of criminal justice, the defense is in the most advantageous position to evaluate "realistically" the defense and trial strategy and what is in the best interest of the defendant with respect to the procedural aspects of a trial. See Brooks v. Tennessee, 406 U.S. 605 (1972). As recognized in United States v. Dinitz, 424 U.S. 600, 609 (1976), the defendant should "retain primary control over the course to be followed" when an event places him in a quandry as to whether to ask for a mistrial or proceed with the trial despite the disrupting factor.

When a court, faced with the duty to weigh scrupulously the circumstances and cautiously consider whether the ends of substantial justice compel a decision that the defendant's right to be tried once is to be sacrificed for the public good by declaring a mistrial over the defendant's explicit objection to a second trial, the record of the proceeding should reflect what is mandated and promised by Justice Story in Perez. That mandate in Perez is firmly and clearly in focus in the case at bar. The defense did not equivocate but forthrightly demanded that the trial court give credence to the

defendant's desire to accept what was his--a valued protection against protracted criminal litigation and, the record in this case lends no support to a claim that the defendant's Fifth Amendment protection was outweighed by considerations of public justice. The record merely reflects a conclusatory opinion by the trial judge that he was declaring the mistrial to further justice for the defendant and the prosecution despite the plea by the defense that this result would not further justice for the defendant. It can be supposed that the defendant's illness alone dictated the result--a mistrial, regardless of the alternatives made plain to the judge. It can also be supposed--and ironically so--that the ailment suffered by the accused fit the theory of the defense--that the defendant was sick albeit mentally ill. Nothing in the record reflects this latter supposition as a basis for the mistrial--and rightfully so. What can more reasonably be supposed is that the court was pushed into declaring the mistrial because of the adamant position of the prosecution that "under no circumstances" would it proceed without the defendant's continued presence, and the prosecutor's statements, "I now suppose the only alternative is a mistrial.... Jeopardy is not [a]ffected by the Court on its own motion declaring a mistrial." App. at 14, 17, 19. In the words of Gurfein, C.J., in United States v. Glover, supra, at 294,

to permit the trial to be aborted might lead to mistrials covertly for the benefit of a prosecution that needs strengthening.

The danger that the happenstance of Dunkerley's brief illness gave the prosecution an opportunity to "strengthen" its case is apparent on this record and the mistrial may have well been declared solely to accommodate the prosecution's desire to start the trial again at a later date. This danger brings to mind Mr. Justice Douglas' words in Downum v. United States, supra, at 738:

We resolve any doubt "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion."

V. CONCLUSION

The situation precipitating the consideration of a mistrial in the instant case, a temporary physical malady, cannot be characterized as caused by the defendant in the sense that he should be responsible for whatever decision the judge might make with regard thereto. In the tradition of pure parens patriae power, it would make sense to accommodate the ill defendant so as to protect him from adverse consequences brought about by the mishap. Simply said, however, there was no justification to place parens patriae considerations in direct opposition to the rights of the defendant to a speedy and single trial, especially when the defendant expressly made his position known to the court. The only reason to overrule the defendant's requests would have to be found in the interest of public justice. The silence of the trial court with regard to the public interest makes argument difficult. The only reasonable conclusion, however, is that Dunkerley's rights were impermissibly subordinated to the desire of the prosecution to end the trial and begin again with "schooling" learned in the first trial. The prosecution's words expressing an adamant refusal to proceed in the defendant's absence and its position that jeopardy would not be a problem were the court to declare a sua sponte mistrial suggest that the court ruled without consideration of Dunkerley's "valued" rights. At the very least, the danger that the trial court acted in such impermissible deference to the prosecution requires a reversal.

In the words of Justice Douglas, dissenting in Gori v. United States, supra, at 373,

The policy of the Bill of Rights is to make rare indeed the occasions when the citizen can for the same offense be required to run the gauntlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution put it--on the Government.

Certainly, the State has presented no justification for the mistrial in State v. Dunkerley. Thus, the double jeopardy provision of our federal Constitution embodies the concept that only under extraordinary circumstances shall the "ground be travelled twice." "Absolution" for crime is not in issue in these circumstances. As stated in Abney v. United States, supra, at 660.

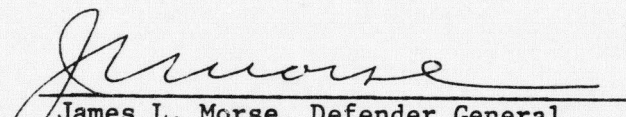
In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him....Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him.

For the foregoing reasons, appellant-petitioner requests this Court to reverse the denial of his petition for habeas corpus and order the immediate execution of the writ.

DATED at Montpelier, Vermont, this 2^d day of December, 1977.

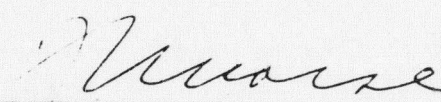
Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 5th day of December, 1977, I served two copies of the foregoing Brief of the Petitioner-Appellant and one copy of the accompanying Appendix upon the Defendant-Appellee by mailing true conformed copies thereof to Dale Gray, State's Attorney of Caledonia County, St. Johnsbury, Vermont and to the Office of the Attorney General, Montpelier, Vermont 05602.



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